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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 633

DR. ALLEN M. KREBS and WALTER D. TEAGUE, III, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

—v.—

JOHN M. ASHBROOK, JOHN H. BUCHANEN, JR., DEL CLAWSON, JOE R. POOL, RICHARD ICHORD, WILLIAM M. TUCK, GEORGE F. SENNER, JR., CHARLES L. WELTNER, EDWIN E. WILLIS, individually and as Chairman and Members of the Committee on Un-American Activities of the United States House of Representatives; DAVID G. BRESS, United States Attorney for the District of Columbia,

Respondents.

PETITIONERS' RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION

ARTHUR KINOY
WILLIAM M. KUNSTLER
HARRIET VAN TASSEL
511 Fifth Avenue
New York, New York

JEREMIAH GUTMAN
NANCY STEARNS
363 Seventh Avenue
New York, New York

ARTHUR KINOY
JEREMIAH S. GUTMAN
NANCY STEARNS
Of Counsel

MELVIN L. WULF
BURT NEUBORNE
156 Fifth Avenue
New York, New York

PHILIP J. HIRSCHKOP
110 N. Royal St.
Alexandria, Virginia

Attorneys for Petitioners

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Petitioners Agree That There Is a Critical Need for a Speedy Determination of the Constitutional Questions Raised Herein

Petitioners wish to stress their agreement with the major point on which Respondents have based their argument in opposing our petition for certiorari to this Court, that is,

that the petition raises important substantive contentions the consideration of which must not be further delayed. (Brief for Respondents in Opposition, p. 6.) Respondents have argued that plenary review by this Court should not be granted because it would delay District Court "consideration of those substantive contentions on their merits"—contentions raised both in this case and in *Stamler* v. *Willis*, Nos. 478, 479, this Term. Although Respondents expressly incorporated in this case their procedural argument tendered in *Stamler* v. *Willis* concerning whether the constitutional questions should be heard by one judge or three, they have gone to pains to avoid incorporating their substantive arguments although the constitutional questions are identical. It appears that they have little confidence in those arguments and no concern for the inconsistency of result which they seek.

Both Petitioners and Respondents are plainly concerned that the important First Amendment questions raised herein be promptly considered. Just over one month ago, in October, 1968, the House Committee on Un-American Activities resumed hearings under the mandate which we challenge. One of the persons even now under continuing subpoena and ordered to reappear before the Committee on December 2, 1968, had unsuccessfully sought to intervene in this case shortly after it was commenced in 1966. The speedy determination of the substantive questions raised by Petitioners is of great concern not only to all of the parties in this action and in *Stamler,* but also of immediate concern to those who are subject to outstanding Committee subpoenas and of paramount importance to the First Amendment itself.

One of the two major reasons for the creation of the three judge court procedure under 28 U. S. C. 2282 was

to facilitate a speedy final determination via direct review to this Court when an injunction is sought against an allegedly unconstitutional act of Congress and the program it authorizes. Consistent with this purpose, the three judge court should be reconvened to rule on the merits of the questions raised by Petitioners.

Many of the issues raised by Petitioners have been presented to the three judge court below, and in fact were before that court for many months before it chose to avoid the sensitive character of those issues by dissolving itself on the tenuous distinction between identical provisions in the challenged statute and rule (that distinction was rejected by Chief Circuit Judge Bazelon, who preferred to proceed with the substantive matters, as well as by the Seventh Circuit in *Stamler*). As Justice Harlan stated just last week in *Epperson* v. *Arkansas,* 37 LW 4017, 4022 (November 12, 1968), "[w]ith all respect, that court's handling of the case savors of a studied effcrt to avoid coming to grips with [these issues]."

Since, however, this Court has the power fully to determine now the constitutionality of the statutory mandate of the House Committee on Un-American Activities, Petitioners urge that this Court do so on the basis of plenary argument, thus delaying no further the long overdue determination of the critical First Amendment questions raised herein, issues which would ultimately and inevitably reach here again, thus obviating two major trials of identical issues which would consume the time and energy of possibly six federal judges for a lengthy period and eventually require the attention of this Court anyway.

Petitioners Have *Not* Abandoned the Principle That Even If Rule XI Were Alone Challenged a Three Judge Court Would Be the Required Forum

Respondents have mistakenly stated (Brief for Respondents in Opposition, p. 6) that Petitioners concede that, if Rule XI alone were the subject of this litigation, a three judge court would not be required. This is definitely *not* the case. To the contrary, Point 5 of our Petition for Certiorari, pp. 29-30, shows that the policy behind 28 USC 2282 requires that a three judge court determine the constitutionality of this major congressional committee regardless of whether Rule XI alone, or the identical provision in the Legislative Reorganization Act of 1946, were challenged. This position was briefed and argued rather more fully in the Court of Appeals. (Brief and Appendix for Appellants, pp. 27-30.*) We would also incorporate the arguments presented by Appellants in *Stamler* v. *Willis*, appearing on pages 17-21 of

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* Petitioners noted for the court below that, as pointed out by Chief Circuit Judge Bazelon in his dissent from the opinion of the three judge court, *Krebs* v. *Ashbrook*, 275 F. Supp. 111, 120 (D. C. D. C. 1967), §2282 "speaks of 'any Act of Congress,' and neither Congress nor the Supreme Court has provided us with sufficient guidance to carve out exceptions to it." The words "Act of Congress" are nowhere defined in the United States Constitution or in 28 U. S. C. 2282 or 2284. Nowhere are they limited to what traditionally is meant by the words "law" or "statute," and even the latter term has on occasion been given a somewhat flexible meaning by this Court. See *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D. C. D. C. 1956), *Liveright* v. *Joint Committee of the General Assembly of the State of Tennessee*, 279 F. Supp. 205 (M. D. Tenn., 1968), *A. F. of L.* v. *Watson*, 327 U. S. 582 (1946), *Stevens* v. *Griffith*, 111 U. S. 48 (1884) and *United States* v. *Rumely*, 345 U. S. 41 (1953), all discussed by Petitioners below, supporting our contention that the words "Act of Congress" encompass not only the type of act (statute) exemplified by the Legislative Reorganization Act of 1946, but also such a Congressional act as Rule XI itself.

Appellants' Reply to Motion to Dismiss or Affirm. Respondents' mistaken assertion that we have conceded the contrary merely underscores their failure to recognize and accept the overriding purpose of the three judge court procedure—to insure that three judges, not merely one, will share the responsibility of determining whether to issue an injunction against one of the *most* sensitive of congressional regulatory schemes, the political investigation of our citizens.

Finally, Respondents suggest that the Committee, the Courts, and the Department of Justice, in referring to the Legislative Reorganization Act as the authority for the Committee, have made those references "loosely" (Brief for Respondents in Opposition, p. 9). Certainly, the Department does not draw its criminal indictments loosely, nor does this Court write its opinions loosely. Such an assertion seems to be of the same order as that the Legislative Reorganization Act itself was merely an "historical accident" (*Stamler* Motion to Dismiss or Affirm, page 8) or that Rule XI of the Act is merely a simple inconsequential "piece of paper" (Respondents' Brief, page 9) rather than the authority for an investigatory scheme whose power and impact have been felt by thousands if not millions of Americans over its history and which is currently being felt and will be increasingly felt by countless more in absence of the judicial protection sought in this action.

Perhaps Respondents are right in arguing that neither the Committee nor the Department, much less any court, was thinking of technical differences between Statute and Rule when they made the early references to authority mentioned above, but there can be no doubt that their intention, in making such references, was to buttress subpoenas,

questions and threats, charges and convictions of contempt with the full weight and authority of a law, a statute, an Act of Congress. The repeated demands that witnesses divulge their beliefs and associations, despite claims of constitutional protection, were routinely expressly based on Public Law 601. It is incredible that the Committee members thought or wanted their victims to think that they were merely acting in exercise of a rule making power delegation rather than pursuant to an Act of Congress.

In Light of the Granting of Certiorari in *Adam C. Powell* v. *McCormack* Certiorari Should Be Granted Herein

On November 18, 1968, this Court granted certiorari in the case of *Powell* v. *McCormack,* #138, this Term, on the following question among others:

> Whether the District Court erred in refusing to certify the necessity for a three judge statutory court and, if so, whether this Court should order the convening of such a court to grant forthwith the relief prayed for herein.

Since granting a three judge court in *Powell,* which involves solely a House resolution, would logically necessitate the granting of a three judge court herein, where, as in *Stamler,* a House resolution and an identical statute are involved, but denial of such a court in *Powell* would not compel a denial herein, this case presents issues of conceded importance which should also be answered by this Court.

CONCLUSION

As Respondents have pointed out, both the District Court and the Court of Appeals have decided that we are to have our day in court to determine the overriding constitutional questions raised herein. Respondents have also asserted the appropriateness of a speedy determination of those substantial constitutional questions. Petitioners therefore pray that this Court make a full and complete determination of all the issues raised herein on the basis of plenary argument or, in the alternative, that it reverse the decision below and remand this cause to the reconvened three judge court for a prompt trial.

Respectfully submitted,

ARTHUR KINOY
WILLIAM M. KUNSTLER
HARRIET VAN TASSEL
511 Fifth Avenue
New York, New York

JEREMIAH GUTMAN
NANCY STEARNS
363 Seventh Avenue
New York, New York

ARTHUR KINOY
JEREMIAH S. GUTMAN
NANCY STEARNS
Of Counsel

MELVIN L. WULF
BURT NEUBORNE
156 Fifth Avenue
New York, New York

PHILIP J. HIRSCHKOP
110 N. Royal St.
Alexandria, Virginia

Attorneys for Petitioners